Supreme Court, U. S.
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No. 80-1110

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH SAND,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT E. KOSTIN (P-16168)
Counsel of Record
DAVID S. ANDERSON (P-31213)
2760 Dixie Highway
Pontiac, Michigan 48054
(313) 674-4823

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

-- QUESTIONS PRESENTED

I

WHETHER PETITIONER'S COMPELLED "IN COURT" VOICE EXEMPLAR CONSTITUTED TESTIMONIAL EVIDENCE VIOLATIVE OF HIS 5TH AMENDMENT CONSTITUTIONAL RIGHT AGAINST SELF INCRIMINATION.

II

WHETHER PETITIONER'S COMPELLED "IN COURT" VOICE EXEMPLAR WAS SO UNNECESSARILY SUGGESTIVE THAT THERE EXISTED A SUBSTANTIAL LIKELIHOOD OF MISTAKEN IDENTIFICATION THEREBY VIOLATING HIS 5TH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND 6th AMENDMENT CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

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PETITION FOR WRIT OF CERTIORARI

Now comes the Petitioner, JOSEPH SAND, by and through his attorney, ROBERT E. KOSTIN, and Petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinions of both the Federal District Court (79-50033) and Court of Appeals for the Sixth Circuit (79-5334) are unreported. Copies of the opinions are attached in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 3, 1980. Jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL AMENDMENTS INVOLVED

CONSTITUTION OF THE UNITED STATES, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial trial of State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FACTS

1. On January 5, 1978, Petitioner appeared before a Federal Grand Jury to give testimony in the matter of the United States v. Charles Crosno. Petitioner was asked numerous questions regarding conversations he may have had with Mr. Crosno about the "fencing" of stolen auto parts. Petitioner denied having had such conversations.

Your Petitioner was indicted on three (3) counts of Perjury (Making false declarations before a Grand Jury), and a trial began on May 7, 1979. On May 16, 1979, a mistrial was declared because of a jury deadlock.

On May 31, 1979, a superseding two (2) counts indictment was filed again charging your Petitioner with perjury. A jury returned a guilty verdict on both counts on July 23, 1979. On September 18, 1979, the Honorable James Harvey sentenced your Petitioner to three (3) years on each count, the sentences to run concurrently.

2. The evidence at trial showed that the F.B.I. had obtained a wire tap order and had intercepted two (2) telephone conversations between Mr. Crosno and a person referred to as "Joe" (alleged by the government to be your Petitioner). The intercepted communications included references to the theft and sale of auto parts. The government introduced Exhibit #6, a cassette tape of two (2) telephone conversations in which Petitioner was an alleged participant and government Exhibit #8, a transcript of the Exhibit #6 conversations. Pursuant to a Court order the government also procured an

extrajudicial recorded voice exemplar from your Petitioner which was introduced into evidence as government Exhibit #21. During the trial several government witnesses testified that they had met the Defendant and that one of the voices on government Exhibit #6 was the voice of your Petitioner.

Thereafter, the defense called several witnesses who knew your Petitioner and who stated that the voice on government Exhibit #6 was not the voice of your Petitioner. The defense also called an expert from the Voice Identifications Unit of the Michigan State Police who was unable to conclude that the voices on the government Exhibit's #6 and #21 were of the same individual. The government thereafter requested additional exemplars from the Petitioner, which request was denied by the Court.

On rebuttal, over Petitioner's objection, the government introduced Exhibit #23, a tape recorded voice of your Petitioner at his arraingment.

Pursuant to the government's motion, over Petitioner's objection, your Petitioner was then ordered to sit in a chair next to an F.B.I. Agent, in front of the jury, and required to repeat approximately 2½ pages of the government Exhibit #8 transcript.

The trial court did not instruct the jury to disregard in their deliberations the demeanor of the Defendant during his forced recitation of portions of the government's Exhibit #8.

3. The Court of Appeals affirmed the trial court stating that your Petitioner being compelled to give a voice exemplar in the presence of the Jury is not violative of his 5th Amendment right against self-incrimination

but such procedure is subject to close scrutiny because of the "potential danger" which exists in such a situation.

The Court did not indicate *what* the "potential danger" is but did state the Defendant might be embarrassed or demeaned and the jury's attention necessarily called to his failure to testify.

The Court concluded it might have been better to obtain the voice exemplar out of the presence of the jury, or in some other reasonable manner but that the trial court had not abused it's wide discretion under the facts of the case.

ARGUMENT FOR ALLOWANCE OF WRIT

Petitioner contends that a review on writ of certiorari be granted for the reason that neither the several courts of appeal nor this court has ever established the limits to the government's use of a compelled "in court" voice exemplar for in court identification purposes. This question is substantial and of fundamental fairness involving the 5th Amendment rights against self-incrimination and to due process of law and the 6th Amendment right to a fair trial. The absence of meaningful restrictions and guidelines to the "in court" use of voice exemplars promotes their unfettered use by the government under the guise of physical evidence thereby permitting the circumvention of a defendant's 5th and 6th Amendment Constitutional rights.

This question was neither addressed nor decided by the Court of Appeals for the 6th Circuit, who cited as authority for it's opinion, case law standing for the principles that court ordered voice exemplars are not per

se violative of a defendant's 5th Amendment rights (*U.S.* v. *Franks*, 511 F.2d 25, 32 (6th Cir. 1975), *U.S.* v. *Woods*, 544 F.2d 242,263 (6th Cir. 1976), *cert denied*, *U.S.* v. *Wade*, 388 U.S. 218 (1967) and the propriety of a government attorney's comment to the jury in closing argument that the defendant had refused to provide a court ordered voice exemplar (*U.S.* v. *Mitchell*, 566 F.2d 371, 382 (6th Cir.) *cert. denied*).

The need and importance for such restrictions is evidenced and underscored by the language of this Court's decision in *U.S.* v. *Wade*, 388 U.S. 218, at page 222, wherein the Court in *Holt* v. *U.S.* was quoted as stating "we need not consider how far a court would go in compelling a man to exhibit himself."

Petitioner contents that the District Court erred in compelling the Petitioner's in court recitation for the following reasons.

1. Compelling the Petitioner to sit before the jury and read a 2½ page transcript of a phone call in which he was one of the alleged participants constituted testimonial evidence procured in violation of the Petitioner's 5th Amendment right against self-incrimination.

It is recognized and acknowledged that both Federal and State Courts have generally held that voice exemplars are not protected by the right against self-incrimination on the basis that the compulsion is for purposes of identification and as such, constitutes physical evidence as opposed to testimonial or communicative evidence.

However, this construction does not authorize the unfettered use of voice exemplars.

In Petitioner's case, the government had previously introduced into evidence two voice exemplars of the Petitioner for identification purposes: a tape recording of the very telephone conversation which the Petitioner was alleged to have participated in and a recording of Petitioner's statements during arraignment.

Compelling the Petitioner to thereafter sit facing the jury and recite the exact words from a 2½ page transcript of the very utterances upon which the government's perjury case against your Petitioner was based, transcends the limits of physical evidence for identification purposes.

Any justification or need for the acquisition of the Petitioner's speech characteristics had twice been satisfied.

The self evident purpose of the recitation was testimonial in nature for your Petitioner was compelled to communicate the very words upon which the government based his alleged guilt. This recitation was not limited to a selected passage but encompassed 2½ pages of incriminating dialogue, resulting in the existence of a substantial likelihood of irreparable misidentification.

2. Aside from the testimonial character of the recitation, the totality of the circumstances surrounding it were so unnecessarily suggestive that it gave rise to a very substantial likelihood of irreparable misidentification, thereby violating Petitioner's 5th Amendment right to due process of law and 6th Amendment right to a fair trial.

Notwithstanding the constitutional acceptance of voice exemplars for identification purposes, due process requires that the procedure not be unnecessarily

suggestive. The underlying policy of the due process guarantee is to avoid and prevent mistaken identification.

This determination requires that the totality of the circumstances surrounding the acquisition, use, manner, context and content of the evidence be scrutinized.

Petitioner's objectionable voice exemplar was acquired at the insistance of the government on rebuttal after having previously procured and introduced two different voice exemplars of Petitioner.

Over Petitioner's objection, he was compelled to face the jury during trial and in the company of an F.B.I. agent, recite a 2½ page transcript of the very incriminating statements upon which the government's perjury indictment was filed. The context of this recitation, without more, conveyed to the jury the government's unavoidable and unmistakable impression that as the accused, Petitioner was the participant in the conversation. Consequently, the trial court setting of the recitation was itself inherently and patently suggestive.

The inherent suggestiveness of this proceeding was unnecessary in view of the two previously introduced and admitted voice exemplars which contained ample voice characteristics to permit an objective identification by a witness or the jury.

The manner and content of this recitation contributed to the unnecessarily suggestive environment to further the probability of a mistaken identification.

Being compelled to face the jury during the entire 2½ page recitation injected considerations of candor and demeanor which are immaterial to any professed government purpose of identification and yet unfairly

prejudicial to the Petitioner. At no time were the jurors instructed to disregard in their deliberations the Petitioner's demeanor during this in court recitation.

The immediate presence of an F.B.I. Agent during Petitioner's entire 2½ page recitation was not only unnecessary but so inherently and unfairly suggestive of guilt that a mistaken identification was unavoidable.

The susceptibility of unnecessary suggestion is greatest when the opportunity for independent identification is insubstantial. In the case at bar, your Petitioner's was presented during the trial before the jury as a sole defendant offered by the government as the accused. Conviction necessitated your Petitioner's identification as one of the participants in the tape recorded telephone conversation which had already been played for the jury. There existed no witnesses who could identify your Petitioner as one of the participants independent of a voice identification. Therefore, the susceptibility of Petitioner's identification by unnecessary suggestion was at a maximum.

The isolation of Petitioner before the jury as the focus of attention while reciting verbatim the 2½ page transcript of the subject conversation upon which the government's case rested was so inherently and unnecessarily suggestive that it completely obliterated any opportunity for the exercise of independent objective identification by the jury.

The totality of the circumstances attending the recitation produced a substantial likelihood of irreparable misidentification, thereby violating Petitioner's 5th Amendment right to due process of law and 6th Amendment right to a fair trial.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ROBERT E. KOSTIN (P 16168)
Attorney for Petitioner
DAVID S. ANDERSON (P 31213)
2760 Dixie Highway
Pontiac, Michigan 48054

APPENDIX

ORDER

(United States Court Of Appeals
For The Sixth Circuit)

United States of America, Plaintiff-Appellee v. Joseph Sand, Defendant-Appellant. 79-5334

Before: WEICK and ENGEL, Circuit Judges and CECIL, Senior Circuit Judge

Joseph Sand appeals from a judgment entered upon a jury conviction on a two-count indictment charging him with perjury before a grand jury, 18 U.S.C. §1623. In his direct appeal, Sand asserts that the district court committed reversible error when it compelled him to repeat before the jury portions of the transcript of a wiretapped phone call which, the government asserted, established that his testimony before the grand jury was perjured. He also asserts that the trial court erred in denying his motion for judgment of acquittal for insufficiency of evidence and in denying his motion to dismiss the indictment because it failed on its face to set forth facts clearly and unequivocally establishing the crime of perjury. Finally, he asserts that the trial on the perjury counts violated his rights under the Double Jeopardy Clause of the United States Constitution because a previous jury trial was improperly and prematurely terminated.

The most serious claim of error is the first, even though it is clear that the use of the voice exemplar itself

violates no constitutional rights of the defendant. *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Franks*, 511 F.2d 25, 32 (6th Cir. 1975). *Accord, United States* v. *Woods*, 544 F.2d 242, 263 (6th Cir. 1976), *cert. denied*, 429 U.S 1062, 430 U.S. 969, 431 U.S. 954 (1977); *United States* v. *Mitchell*, 556 F.2d 371, 382 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977). With respect to whether any rights of the defendant were violated by his being compelled to give the voice exemplar in person and in the presence of the jury, the court is of the opinion that while such a procedure is not violative of his Fifth Amendment right against self incrimination, it is a procedure which is nonetheless subject to close scrutiny because of the potential danger which exists in such a procedure. A defendant who does not elect to testify, in being compelled to undergo such a test before the jury, might be embarrassed or demeaned and the jury's attention necessarily called to his failure to testify.

While it would have been the better practice to have granted the defendant's request made through counsel to obtain his voice exemplar out of the presence of the jury or in some other reasonable manner which would have protected him from potential embarrassment, the court is unable to conclude that the district judge abused his wide discretion under the particular facts of this case. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

ISSUED AS MANDATE: November 25, 1980

JUDGMENT AND PROBATION ORDER

(United States District Court
Eastern District Of Michigan
Southern Division

United States of America v. Defendant: Joseph Sand. 79-50033

In the presence of the attorney for the government the defendant appeared in person on this date 9/18/79.

Counsel: With Counsel Robert Kostin

Plea: Not Guilty

Finding and Judgment: There being a finding/verdict of Guilty. Defendant has been convicted as charged of the offense(s) of Perjury before the Grand Jury (2 Counts), in violation of 18 USC 1623.

Sentence or Probation Order:

On Count I: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3 (three) years and that defendant shall become eligible for parole, under 18 USC 4205(b)(2), at such times as the Parole Commission may determine.

On Count II: IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 3 (three) years and that

defendant shall become eligible for parole, under 18 USC 4205(b)(2), at such times as the Parole Commission may determine.

The sentence on Count II shall be concurrent with the sentence on Count I.

Special Conditions of Probation: Defendant is to report September 25, 1979 at 1:00 p.m. to the United States Marshal's Office, Flint, Michigan. Bond shall be cancelled upon defendant's surrender.

Commitment Recommendation: The court orders commitment to the custody of the Attorney General and recommends, [blank]

Signed by U.S. District Judge: James Harvey
September 19, 1979

No. 80-1110

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OCTOBER TERM, 1980

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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No. 80-1110

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether requiring petitioner to read aloud from a transcript in the presence of the jury violated his constitutional rights.

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Miscellaneous:

1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977) 4

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1980. The petition for a writ of certiorari was filed on December 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a second jury trial in the United States District Court for the Eastern District of Michigan,[1] petitioner was convicted on two counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of three years' imprisonment (Pet. App. 13-14). The court of appeals affirmed (Pet. App. 11-12).

On January 5, 1978, petitioner appeared before a federal grand jury investigating a scheme to sell automobile parts stolen from a General Motors plant. The mastermind of this scheme was Charles Crosno. During the grand jury proceeding, petitioner testified that he had never discussed the theft or sale of the stolen parts with Crosno (Tr. 17).

At trial, the government played a tape recording, intercepted as the result of a court-authorized electronic surveillance of Crosno's telephone, of a conversation between Crosno and a person named Joe. In the course of the conversation, Crosno and Joe discussed the description, value, and sale of stolen automobile parts (Tr. 102, 131-139; Gov't Exhs. 6, 8). Police investigators and a co-worker testified that they recognized the voice of Joe as that of petitioner (Tr. 148, 187, 255, 274).

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[1] Petitioner's first trial resulted in a mistrial when the jury was unable to reach a verdict (Pet. 3).

Prior to trial and pursuant to a court order, petitioner furnished the government with a voice exemplar in which he repeated the statements made by Joe during the intercepted conversation (Gov't Exh. 21). At trial, several defense witnesses acquainted with petitioner's voice testified that although they recognized his voice in the exemplar, they did not recognize his voice in the intercepted conversation (Tr. 424, 439, 448, 472). A Michigan state police officer trained as an audiologist also testified that although the voice in the exemplar and the voice in the intercepted conversation exhibited similarities, he could not state with certainty that they were identical because the voice in the exemplar exhibited an apparent speech impediment (Tr. 517, 521).

In presenting its rebuttal, the government played a tape recording of petitioner's statements during his arraignment to assist the jury in comparing that voice with the voice in the Crosno conversation (Tr. 554, 588). The trial judge also permitted the government to present an in-court exemplar of petitioner's voice by requiring him to read a portion of the transcript of the intercepted conversation. The judge instructed the jury that this reading was not testimony, and that "[w]hat [petitioner] is saying is to be used by you only to assist you in comparing the voice of [petitioner] with that of the voice identified as Joe" in the intercepted conversation (Tr. 598). After hearing petitioner read, the audiologist testified that there were no obvious differences between petitioner's voice and the voice in the intercepted conversation (Tr. 602).

ARGUMENT

1. Without citing any authority, petitioner contends (Pet. 5-7) that requiring him to read to the jury portions of a transcript of a tape-recorded conversation constituted compelled testimony, in violation of the Fifth Amendment. But this Court concluded more than 70 years ago that the privilege against compulsory self-incrimination does not

entitle a defendant to "exclu[de] * * *his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *Holt* v. *United States*, 218 U.S. 245, 253 (1910). See, *e.g.*, *United States* v. *Euge*, 444 U.S. 707, 718 (1980). Hence, as petitioner expressly concedes (Pet. 6), it is well settled that a defendant may constitutionally be compelled to give a voice exemplar. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 5-7 (1973); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *United States* v. *Franks*, 511 F. 2d 25, 32 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

Petitioner nonetheless suggests that the government's "unfettered" use of voice exemplars somehow trenched upon his right to remain silent. The trial judge carefully explained, however, that petitioner's spoken words were not presented for their testimonial value, but as an identifying physical characteristic to provide both the jury and the expert witness a basis for comparing petitioner's voice with that of "Joe's" in the intercepted conversation. The courts of appeals have repeatedly held that such physical demonstrations involving the defendant and accompanied by proper limiting instructions are permissible. See, *e.g.*, *United States* v. *Murray*, 523 F. 2d 489, 492 (8th Cir. 1975); *United States* v. *Turner*, 472 F. 2d 958, 960 (4th Cir. 1973); *United States* v. *Doremus*, 414 F. 2d 252, 254 (6th Cir. 1969); *United States ex rel. O'Halloran* v. *Rundle*, 384 F. 2d 997 (3d Cir. 1967).

2. For similar reasons, there is no merit to petitioner's contention that the compelled recitation deprived him of due process and a fair trial. The record shows that this recitation was not conducted in a humiliating, demeaning, or misleading fashion (Pet. App. 12), and the trial court's instructions ensured that the jury did not draw any

improper inferences from this demonstration. Moreover, since petitioner does not claim that his recitation was in any way unrepresentative of his normal speaking voice, the jury's ability to hear petitioner speak and to consider another voice exemplar undoubtedly aided rather than impeded the truth-finding process. Accordingly, the court of appeals correctly concluded that petitioner was not denied a fair trial or due process of law. See, *e.g.*, *United States* v. *Giese*, 597 F. 2d 1170, 1193 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Doremus*, *supra*, 414 F. 2d at 254.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

JOHN F. DEPUE
Attorney

FEBRUARY 1981

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[2]Petitioner erroneously suggests (Pet. 8) that the in-court voice exemplar improperly injected his demeanor into the proceedings. Petitioner did not request a limiting instruction on this ground, however (Tr. 597). In any event, if petitioner had refused to comply with the court's order or had attempted to disguise his voice, the jurors would have been entitled to consider his behavior as evidence of consciousness of guilt. See, *e.g.*, *United States* v. *Mitchell*, 556 F. 2d 371, 382 n.7 (6th Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Franks*, *supra*, 511 F. 2d at 35-36; *United States* v. *Nix*, 465 F. 2d 90, 93 (5th Cir.), cert. denied, 409 U.S. 1013 (1972); 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 15.15, at 471 (3d ed. 1977). And, given the trial court's limiting instruction, the jurors' opportunity to observe petitioner while he read from the transcript did not differ significantly from their opportunity to observe petitioner's general demeanor throughout the trial.